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In the Supreme Court of the United States

OCTOBER TERM, 1954

RICHARD J. FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL MANDELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-184

RICHARD J. PORTELA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-5215

SAMUEL MANARITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate 18 U.S.C. 1465 by transporting obscene material interstate for the purpose of sale or distribution (Tr. 1880),[1] and petitioner Portela was convicted of four substantive violations of that statute. Manarite was sentenced to confinement of eighteen months and fined $5,000, and Portela was sentenced to concurrent prison terms of three years and fined $30,000. The court of appeals affirmed (Pet. App. A).[2]

The evidence at trial is not in dispute. It showed that petitioner participated in an enterprise engaged in the production and distribution of obscene material.[3] The material included magazines, films and playing cards produced in New York City from November 1968 to October 1969 (Tr. 4-6, 12-28, 37-38, 44-45) and thereafter transported to various cities, including Richmond, Philadelphia, Baltimore, Minneapolis, Cleveland, Chicago and Washington, D. C. (Tr. 154-159, 161-187, 196-209, 458-459, 461-464, 469-473, 788-790, 792-797, 801-806). Portela distributed the material and employed various persons

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[1] "Tr." refers to the transcript of the proceedings in the District Court, a copy of which is on file with the Clerk of this Court in No. 71-5215.

[2] The court of appeals' opinion is reproduced as Appendix A to both petitions, and "Pet. App. A" refers to the appendices in both petitions.

[3] We have requested the clerk of the court of appeals to forward the exhibits concerning this material to the Clerk of this Court.

to assist him (see, *e.g.*, Tr. 4, 14-28, 36-41, 149-151, 154-167, 181-184, 196-203, 464-466, 476-477, 788-796, 801-806, 1027-1028). Manarite was the financier of the operation (Tr. 214-215, 793-794, 1027-1028).

The government introduced no extrinsic evidence to prove the obscenity of the materials at issue, but rather relied solely on the material itself. Petitioners attempted to show that the material did not exceed contemporary community standards and thus was not obscene by offering in evidence allegedly similar materials purchased in various parts of the country, films which were being publicly exhibited,[4] and the *Report of the Commission on Obscenity and Pornography* (Tr. 1266-1270, 1274-1275, 1286, 1295, 1300-1300A, 1302, 1308-1309, 1320-1325, 1328-1329, 1343-1345). The trial court rejected these offers of proof on the ground that the evidence tendered was inappropriate to establish contemporary community standards (Tr. 1270-1273, 1276, 1282, 1288-1290, 1294-1295, 1301, 1314, 1325-1327, 1329, 1331-1332, 1339-1340, 1342, 1344-1345, 1438-1439).

Immediately prior to trial, Portela moved to suppress a number of items which had been seized from his apartment at the time of his arrest. Law enforcement officials arrested him pursuant to an ar-

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[4] Petitioners at one point also attempted to introduce into evidence newspaper advertisements for films being exhibited in public theaters in an effort to establish community standards (Tr. 1316-1319). At another point, however, it was stated that the newspapers were presented only as demonstrating that the films offered in evidence enjoyed national circulation (Tr. 1340).

rest warrant, but did not have a search warrant. Only two items seized were introduced into evidence, an address book taken from the top of a portable bar next to which Portela was standing and a moneygram found near an end table in the same room next to which two unidentified men were standing. The trial judge held that the seizure of these items was proper under the standards prescribed in *Chimel* v. *California*, 395 U.S. 752.[5]

Petitioners claim that the trial judge erred in excluding the proferred evidence regarding contemporary community standards.[6] Manarite also contends that the government's proof on the issue of obscenity was insufficient because it relied solely on the material; Portela asserts that the trial judge's instructions erroneously referred to children on the contemporary community standards issue and that the seizure of the address book and moneygram was unlawful. These contentions, as the courts below held, are not substantial. When materials are "hard core," the government need not introduce evidence beyond the materials themselves to prove that they are obscene. See, *e.g.*, *United States* v. *Wild*, 422 F. 2d 34 (C.A. 2), certiorari denied, 402 U.S. 986. The exclusion of the allegedly similar materials was proper, because petitioners offered no proof that they enjoyed substantial community acceptance and, standing alone,

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[5] The decision of the trial judge on this issue is reported at 314 F. Supp. 607.

[6] See the government's brief in opposition to the petition for a writ of certiorari in *Miller* v. *United States*, No. 70-43, this Term.

they were not sufficiently probative of national community standards. As the court of appeals' opinion shows (Pet. App. 18a-19a), the limited search and seizure were consistent with *Chimel* v. *California*, 395 U.S. 752.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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